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No. 03-1647

In the Supreme Court of the United States

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,
Petitioner,

v.

WAYNE TURNER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly ruled that the District of Columbia was jointly and severally liable for the prevailing plaintiffs' attorneys' fees in this lawsuit challenging the constitutionality of a District of Columbia statute under 42 U.S.C. § 1983, where the District of Columbia enforced the challenged statute throughout the litigation and provided the relief sought in the complaint only after the court ruled, and where the intervenor-defendant (to whom the district court had allocated most of plaintiff's fees) did not litigate any separate issues and had no power to provide plaintiffs with any of the relief they sought?

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STATEMENT OF THE CASE

It is undisputed that the respondents (plaintiffs below) achieved complete success on the merits of this Section 1983 litigation challenging the constitutionality of a statute of the District of Columbia.[1] The Court of Appeals for the D.C. Circuit held that they were, therefore, entitled to a fully compensatory award of attorneys' fees against the petitioner D.C. Board of Elections and Ethics. The Board was the only defendant plaintiffs had sued, the only defendant that had enforced the challenged statute, and the only defendant that had the power to grant the relief plaintiffs sought.

The Board asserts that the court of appeals erred in awarding plaintiffs a fully compensatory fee. The Board prefers the district court's decision, which "apportioned" most of plaintiffs' fees to the United States, which had intervened to defend the statute—even though the United States could not be made to pay attorneys' fees because its sovereign immunity overrode the consent that its own lawyers had given to an extension of time for plaintiffs to file their fee application.

Under the circumstances of this case, the court of appeals did not err in following this Court's teaching that "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley v. Eckerhart,* 461 U.S. 424, 435 (1983). Nor did the decision below create a conflict among the Circuits, for no Circuit has ever held that "apportionment" is a technique by which a fully successful plaintiff may be deprived of a fully compensatory fee.

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[1] The statute in question was enacted by Congress and was applicable exclusively to the District of Columbia. As a matter of law, "any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." 42 U.S.C. § 1983.

1. The Merits Litigation

On September 17, 1998, the D.C. Board of Elections and Ethics certified that the D.C. Medical Marijuana Initiative had obtained sufficient signatures to be placed on the November 1998 general election ballot. If it became law, that measure would have permitted seriously ill individuals to obtain and use marijuana for medical purposes under the care of a licensed physician without violating the laws of the District of Columbia.[2]

On October 21, 1998, Congress passed and the President signed the fiscal 1999 District of Columbia Appropriations Act. Section 171 of that Act, known as the "Barr Amendment" after its House sponsor (Rep. Bob Barr, R-Georgia), provided that:

> None of the funds contained in this Act may be used to conduct any ballot initiative which seeks to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any schedule I substance under the Controlled Substances Act (21 U.S.C. 802) or any tetrahydrocannabinols derivative.

Pub. L. No. 105-277, § 171, 112 Stat. 2681 (1998).

Although the Barr Amendment was intended to prevent the submission of the Medical Marijuana Initiative to the voters, the general election ballots had already been printed and the Board of Elections determined that it was too late to change them. On November 3, 1998, the citizens of the District of Columbia cast their ballots on the measure.

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[2] The text of the initiative is available at http://www.dcwatch.com/election/init001.htm.

However, when it came time to count the ballots and announce the results, the Board of Elections chose to enforce the Barr Amendment despite the opinion of its own lawyers that the Amendment was unconstitutional.[3] Accordingly, the votes were not counted and the results were not announced or certified, even though D.C. law required the Board to count the ballots and certify the election results.

Plaintiffs filed this lawsuit for the purpose of getting the votes counted and the results announced and certified. Their complaint sought declaratory and injunctive relief, and alleged (a) that the Barr Amendment, properly interpreted, did *not* prohibit the Board of Elections from performing its statutorily-mandated duty of counting the ballots and certifying the results, and (b) that if the Barr Amendment did prohibit the Board from performing its duty, then the Barr Amendment violated the First and Fifth Amendments to the Constitution. Three days after the election plaintiffs filed an application for a temporary restraining order and a motion for a preliminary injunction. That same day the Board of Elections filed a motion for declaratory judgment supporting plaintiffs' arguments that the Barr Amendment was unconstitutional. However, the Board did not join in plaintiffs' statutory construction argument.[4]

On November 23, the United States moved to intervene to defend the constitutionality of the Barr Amendment. After expedited briefing on cross-motions for summary judgment, the merits were argued on December 18 and taken under advisement. Nine months later the district court (Richard W. Roberts, J.) issued its decision. The court concluded, as plaintiffs had argued, that the Barr Amendment did not

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[3] *See* Motion of Defendant for Expedited Review and Declaratory Judgment, Record Doc. 2.

[4] *Id.*

preclude the Board from "counting, releasing and certifying the vote on Initiative 59," because the phrase "conduct any ballot initiative" referred "only to conducting election day affairs." *Turner v. District of Columbia Board of Elections and Ethics,* 77 F. Supp. 2d 25, 29 (D.D.C. 1999). In reaching that conclusion, the court relied heavily on the principle of constitutional avoidance, *id.,* opining that if the Barr Amendment did prohibit the ballots from being counted, "it would have violated plaintiffs' First Amendment rights." *Id.* at 35.

Pursuant to the district court's decision, the Board counted the ballots and announced the results, which showed that the initiative had passed by a landslide, winning 69% of the vote, with a majority in every single precinct.[5]

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[5] The election results are posted on the Board of Election's website at http://www.dcboee.org/information/elec_1998/ini59_98.htm. Despite its passage, however, the measure has not become effective because it has been blocked by a congressional "budget rider" that has been attached to every subsequent D.C. Appropriations Act. The rider currently in effect provides:

> (a) None of the funds contained in this Act may be used to enact or carry out any law, rule, or regulation to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any schedule I substance under the Controlled Substances Act (21 U.S.C. 802) or any tetrahydrocannabinols derivative.
>
> (b) The Legalization of Marijuana for Medical Treatment Initiative of 1998, also known as Initiative 59, approved by the electors of the District of Columbia on November 3, 1998, shall not take effect.

District of Columbia Appropriations Act for Fiscal Year 2004, Pub. L. No. 108-199, Division C, Title III, § 423, 118 Stat. 139 (Jan. 23, 2004).

2. Plaintiffs' Motion for Attorney's Fees

Thirteen days after the district court's summary judgment ruling, plaintiffs filed a Consent Motion for an Order Holding in Abeyance Proceedings Regarding Attorneys' Fees and Costs, which was consented to by both the Board of Elections and the United States.[6] The motion noted that D.D.C. Local Rule 215(b)[7] "recognizes that it may be 'in the interest of justice [for] the fee issues, in whole or in part, [to] be held in abeyance pending the outcome of [any] appeal'" (brackets in original), and represented that "all parties agree that it is in the interest of justice and efficiency to hold those issues in abeyance until it is known whether or not the defendants will appeal from this Court's September 17 Judgment, and, if they do appeal, until after that appeal is adjudicated." The Court issued the requested order, which also instructed the parties to "confer with respect to issues of attorneys' fees and . . . submit to the Court proposed order(s) regarding further proceedings on fee issues" after any appeal of the merits was either adjudicated or foregone.[8]

Neither defendant appealed. The parties then attempted to settle plaintiffs' fee claims, but did not succeed. Accordingly, plaintiffs' detailed Motion for Attorneys' Fees and Expenses was filed on March 31, 2000.[9] It sought fees against the Board of Elections under the Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988, and fees against the United States under the Equal Access to Justice Act, 28 U.S.C. § 2412. Plaintiffs argued that they were entitled to fees under both statutory standards, and fully documented the hours their lawyers had reasonably expended on the litigation and

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[6] Record Doc. 37.

[7] Now recodified as D.D.C. Local Civil Rule 54.2.

[8] Record Doc. 38.

[9] Record Doc. 43.

the lawyers' reasonable hourly rates and out-of-pocket expenses. Plaintiffs argued that the United States and the Board were jointly and severally liable for the fees, recognizing, however, that the liability of the United States was limited by the cap on hourly rates imposed by 28 U.S.C. § 2412(d)(2)(A).[10] Pursuant to Fed. R. Civ. P. 54(d)(2)(D) and 72(b), the fee motion was referred to Magistrate Judge John M. Facciola for proposed findings and recommendations.

a. The Denial of Fees Against the United States

Although the United States had expressly consented to plaintiffs' motion to hold fee proceedings in abeyance, it now asserted that plaintiffs' motion for fees had to be dismissed as untimely, on the ground that the Equal Access to Justice Act required a fee motion to be filed "within 30 days of final judgment in the action," 28 U.S.C. § 2412(d)(1)(B), and that this statutory deadline was jurisdictional and not subject to waiver by the United States or extension by court order.[11]

Plaintiffs argued that principles of equitable tolling applied, particularly since the United States had "prolonged the [fee] settlement consultations due to [its] reassignment of the attorney responsible for this case."[12] But the magistrate judge concluded that the United States' consent to an extension was ineffective and that equitable tolling did not apply. *Turner v. District of Columbia Board of Elections and*

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[10] Record Doc. 43 at 22-24.

[11] United States' Memorandum of Law in Opposition to Plaintiffs' Motion for Attorneys' Fees and Expenses, Record Doc. 51, at 5-9 (citing *Action on Smoking and Health v. Civil Aeronautics Board*, 724 F.2d 211, 225 (D.C. Cir. 1984) and *American Ass'n of Retired Persons v. EEOC*, 873 F.2d 402, 407 (D.C. Cir. 1989)).

[12] Plaintiffs' Reply in Support of Plaintiffs' Motion for Attorneys' Fees and Expenses, Record Doc. 56, at 11.

Ethics, 183 F. Supp. 2d 22 (D.D.C. 2001), Pet. App. 40a. In light of clear Circuit precedent, plaintiffs accepted that decision and did not file objections with the district court.[13]

b. The Magistrate Judge's Award of Minimal Fees Against the Board of Elections

Turning to plaintiffs' motion for fees against the Board, the magistrate judge found that plaintiffs were prevailing parties and that their claimed hours and hourly rates were reasonable. *Turner v. District of Columbia Board of Elections and Ethics,* 170 F. Supp. 2d 1 (D.D.C. 2001), Pet. App. 25a.

The Board of Elections did not dispute those findings. However, it opposed plaintiffs' fee request *in toto* on the ground that Congress, rather than the D.C. government, had enacted the Barr Amendment. Based on that fact, the Board argued that in enforcing the Barr Amendment it was not acting "under color of . . . State" law, as required by 42 U.S.C. § 1983 (and, thus, by § 1988), because "the offending conduct was pursuant to *federal* not state or local law."[14] In a supplemental filing, it asserted that it was not liable for fees because "[p]laintiff has failed to articulate any *fault* on the part of the Board other than that it complied with *federal* law."[15]

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[13] Ironically, this Court's recent decision in *Scarborough v. Principi,* 124 S. Ct. 1856 (May 3, 2004), holding that the EAJA filing deadline is "not properly typed 'jurisdictional,'" *id.* at 1865, overrules the D.C. Circuit cases relied upon by the United States and the Magistrate Judge in dismissing plaintiffs' EAJA fee motion.

[14] Defendant's Opposition to Plaintiffs' Motion for Attorneys' Fees and Expenses, Record Doc. 50, at 7 (emphasis added).

[15] Defendant's Response to Plaintiffs' Additional Statement in Support of their Renewed Motion for Attorneys' Fees and Expenses Against the District of Columbia, Record Doc. 68, at 2 (emphasis added).

The magistrate judge rejected the Board's arguments as a matter of law, observing that they "ignore[] that § 1983 itself acknowledges that '[f]or the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.'" Pet. App. 29a (quoting 42 U.S.C. § 1983). Thus, as a matter of law, the Barr Amendment was attributable to the District of Columbia just as if the D.C. Council had enacted it. *Id.*

The magistrate judge also rejected the Board's argument that its good faith or lack of "fault" would render a fee award unjust. He noted that such arguments had often been made, and as often rejected:

> [T]he proper focus in § 1983 cases is never on the defendants' "fault." It must never be forgotten that Congress enacted the fee shifting provision not to punish defendants but to encourage lawyers to undertake litigation to vindicate the constitutional and statutory rights of those who could not otherwise afford to vindicate those rights. . . . There is absolutely no indication anywhere that the Board would have brought the lawsuit itself had it not been sued. It therefore must be said that, but for plaintiffs' bringing the lawsuit, the results of the initiative would have never been published.

Pet. App. 32a-33a. Thus, the magistrate judge concluded that the Board was liable for fees and expenses under 42 U.S.C. § 1988. Pet. App. 33a ("this is not one of those rare cases where the award of fees is fundamentally unjust").

Nevertheless, he awarded plaintiffs only 3% of the fees they had requested and documented, on two grounds. First,

he reasoned that the Board's liability for fees should exclude all work performed by plaintiffs' counsel after November 6, 1998—just one week after their lawsuit was filed—because on that date the Board had filed a "request for a declaratory judgment" and "effectively ceased opposing plaintiffs." Pet. App. 35a. Second, he *sua sponte* invoked the doctrine of "apportionment," and apportioned even that first week's worth of fees 90% to the United States and 10% to the Board—although the United States had not yet even moved to intervene during that first week. Pet. App. 34a-36a. He reasoned that "the Board was not primarily responsible for the violation" because "it was Congress that passed the legislation." Pet. App. 35a, 36a. Thus, plaintiffs were to receive fees for only one-tenth of the work their lawyers performed during only the first week of this wholly successful litigation.

c. The District Court's Fee Ruling

Plaintiffs filed timely objections with the district court,[16] triggering a *de novo* determination of their fee motion pursuant to Fed. R. Civ. P. 54(d)(2)(D) and 72(b) and 28 U.S.C. § 636(b)(1). The Board did not file any objections to the magistrate judge's rulings, although Rule 72(b) gives any party an additional ten days to file cross-objections after being served with another party's objections.

The district court issued its decision in January 2003. Pet. App. 18a.[17] It noted that plaintiffs' status as prevailing parties was undisputed. Pet. App. 20a. Without discussing or even citing a single court decision or any other authority relating to the apportionment of fees, the district judge concluded that

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[16] Record Doc. 74.

[17] The date of this decision as printed on page 18a of the Petition Appendix is incorrect. The correct date is January 8, 2003.

"apportionment is appropriate in this case," *Id.* He then stated three reasons why plaintiffs' fees should be reduced. First, that "[plaintiffs'] ability to recover a fully compensatory fee . . . is impeded by their failure to have filed their request for fees from the United States in a timely manner." Pet. App. 20a.[18] Second, that "[t]he Board should not be required to pay fees incurred during litigation on the merits after it requested a ruling from the Court that the Barr Amendment was unconstitutional." *Id.* And third, that "[t]he United States in this case was solely responsible for enacting the challenged legislation." Pet. App. 21a. Without explaining how any of these factors related to the relevant caselaw—and without even recognizing that 42 U.S.C. § 1983 made the Barr Amendment a "statute of the District of Columbia"—he followed the magistrate judge's lead and completely denied fees for any work done by plaintiffs' counsel after the first week of litigation, *e.g.*, denying fees for all work on plaintiffs' motion for summary judgment and for the oral argument on that motion. Pet. App. 20a. He thus awarded plaintiffs approximately 18% of the fees they had requested and documented for the merits litigation.[19]

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[18] Petitioner states that "the district court on *de novo* review found that Turner could have received a fully compensatory fee had he timely filed a request for fees from the United Sates under the EAJA." Pet. at 7. That is false. There is no such finding, or statement, or suggestion, in the district court's decision. The only relevant sentence in the district court's opinion is the sentence quoted in the text above. As explained below (*post* at 13 n.21), a timely motion for fees under EAJA would not necessarily have resulted in a fee award because the statutory requirements for an EAJA fee award are significantly more demanding than the requirements under § 1988.

[19] The district court's final fee award (after granting plaintiffs' motion for reconsideration based on erroneous calculations, Record Doc. 87) consisted of $24,000 for the litigation on the merits, $36,929 for the fee litigation and $600 in expenses, for a total of $61,529. Record Doc. 91.

Plaintiffs timely appealed to the D.C. Circuit. The Board of Elections did not cross-appeal.

d. The D.C. Circuit's Ruling

Contrary to petitioner's characterization, the court of appeals' decision had nothing to do with the general question whether an award of attorneys' fees may be apportioned among the losing parties. There is no reason to believe that such apportionment would be improper in the D.C. Circuit, whether the fee award is fully compensatory or less than fully compensatory. To the contrary, the court noted that it "normally would defer to a thoughtful rationale of the district court so long as it achieved a result that was fair to the parties." Pet. App. 8a.

What the court of appeals held was simply that the plaintiffs here—as *concededly* prevailing parties who had achieved complete success on the merits of their case, Pet. App. 6a-7a—were entitled to a fully compensatory award of fees against the Board of Elections on the basis of "well-settled propositions of law." Pet. App. 11a. The court of appeals' decision made no new law. Rather, it rejected the magistrate judge's "novel application of a comparative fault theory based on tort law," Pet. App. 8a, that had been adopted without discussion by the district court (*see* Pet. App. 20a), and that was without support in the law of attorneys' fee awards.[20]

In an opinion by Circuit Judge Judith Rogers, joined by Chief Judge Douglas Ginsburg and Circuit Judge David Tatel, the court of appeals held:

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[20] Notably, the Board of Elections had never even asked the magistrate judge to apportion plaintiffs' fees. He did so *sua sponte*, and without providing the parties any opportunity to address the propriety of apportionment in briefs or argument.

(a) That, in accord with "[l]ongstanding precedents," the plaintiffs, who had achieved excellent results, "should normally receive a fully compensatory attorney's fee." Pet. App. 7a.

(b) That the fact that Congress, rather than the D.C. Council, enacted the Barr Amendment is irrelevant as a matter of law "because under 42 U.S.C. § 1983 the Amendment is treated as a District of Columbia law." Pet. App. 11a.

(c) That "because an award of attorney's fees under § 1988 'is not meant as a "punishment" for "bad" defendants . . . [but] is meant to compensate civil rights attorneys who bring civil rights cases and win them,' the fact that it was not the 'fault' of the Board of Elections that the Barr Amendment was enacted by Congress . . . is not a 'special circumstance' warranting denial of a fully compensatory fee." Pet. App. 11a (quoting *Coalition for Basic Human Needs v. King*, 691 F.2d 597, 602 (1st Cir. 1982) (Breyer, J.)) (brackets in original).

(d) That the plaintiff-friendly arguments made in briefs filed by the Board of Elections' lawyers did not relieve the Board of liability for fees because the Board "continued to enforce the Barr Amendment throughout Turner's § 1983 litigation." Pet. App. 11a (citing, *inter alia, Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 739 (1980)).

(e) That plaintiffs' failure to file a timely application for EAJA fees against the United States was irrelevant to the Board's liability, "because the Board's liability for § 1988 fees is not derivative of the United States'," and because "the immunity of one defendant does not reduce the liability of a

non-immune co-defendant." Pet. App. 11a (citing, *inter alia, Kentucky v. Graham*, 473 U.S. 159, 164-65 (1985)).[21]

(f) That the Board's belated attempt to argue that *it* was a "prevailing party" was not properly before the court as it had not been raised below, and was in any event without merit because the Board was the only party that could count the votes and certify the election results and it had refused to do so. Pet. App. 10a-11a.

(g) That plaintiffs' claims against the Board of Elections and the United States were "non-fractionable" (*i.e.*, they properly gave rise to joint and several liability for fees) because they were "centered on a common set of issues" and did "not [involve] a separate claim against the United States." Pet. App. 14a. As the court explained, even "if the United States had not intervened, Turner would have been required to litigate the merits of his § 1983 claim so long as the Board continued to enforce the Barr Amendment." *Id.*[22]

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[21] The court of appeals misapprehended the record when it said that plaintiffs originally "sought fees from the Board under 42 U.S.C. § 1988 for any amount exceeding the award under EAJA." Pet. App. 4a. Plaintiffs' fee motion reflects their awareness that obtaining fees under EAJA (requiring a finding "that the position of the United States was [not] substantially justified," 28 U.S.C. § 2412(d)(1)(A)) is much more difficult than obtaining fees under § 1988 (requiring only a finding that the plaintiff was a "prevailing party"), and that they therefore might not receive any fees under EAJA. Accordingly, they asked that "a full award should be made against each defendant at this stage because of the possibility that one or both awards may be reversed or reduced on appeal." Plaintiffs' Motion for Attorneys' Fees and Expenses, Record Doc 43, at 24 n.9.

[22] As the court of appeals pointed out, its conclusion rested on a finding of fact by the magistrate judge that "[t]here is absolutely no indication anywhere that the Board would have brought the lawsuit itself had it not been sued. It therefore must be said that, but for plaintiffs' bringing the lawsuit, the results of the initiative would have never been published." Pet. App. 33a. The Board did not file an objection to that

Accordingly, the court of appeals "remand[ed] the case to the district court to enter a fully compensatory award." Pet. App. 16a.

The Board of Elections filed a timely petition for rehearing or rehearing *en banc*. The petition for rehearing was denied. No judge called for a vote on the petition for rehearing *en banc*.

REASONS FOR DENYING THE WRIT

As the court of appeals recognized, the Board's liability for plaintiffs' reasonable attorneys' fees follows from an unambiguous federal statute and from settled principles of law that petitioner chooses to ignore.

First, petitioner ignores the fact that for the purposes of litigation under 42 U.S.C. § 1983, and thus for fee awards under 42 U.S.C. § 1988, Congress has unambiguously provided that:

> any Act of Congress applicable exclusively to the District of Columbia *shall be considered to be a statute of the District of Columbia.*

42 U.S.C. § 1983 (emphasis added). Thus the District's plea that it was not responsible for the Barr Amendment may be true as a matter of fact but is false as a matter of law. The District is responsible for the Barr Amendment just as fully as if that statute had been enacted by the D.C. Council and signed by the Mayor.

Second, petitioner ignores the fact that it was the only party that violated plaintiffs' rights—by refusing to count

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finding of fact with the district court, did not dispute it before the court of appeals, and does not question it here.

their ballots—and the only party that could have provided the relief sought in the complaint—by counting them. Only the petitioner, and not the United States, was subject to a court-ordered "'material alteration of the legal relationship of the parties,'" *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health & Human Resources,* 532 U.S. 598, 604 (2001) (quoting *Texas State Teachers Assn. v. Garland Independent School Dist.,* 489 U.S. 782, 792-93 (1989)). Thus, the Board was the responsible party not only as a matter of law but as a matter of fact.

Third, petitioner ignores the fact that "the most critical factor" in evaluating the reasonableness of a fee award "is the degree of success obtained" by the party seeking fees. *Hensley v. Eckerhart,* 461 U.S. 424, 436 (1983). On the merits of this case, plaintiffs achieved complete success, and "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Id.* at 435. Petitioner points to no authority supporting an award of less than a fully compensatory fee in a case where, as here, a plaintiff was entirely successful in obtaining, through a final, unappealed judgment on the merits, the relief sought in his lawsuit.

The decision below recognized these facts and followed these authorities. It broke no new ground. It does not conflict with any decision of this Court or with the law of any other Circuit. Moreover, the factual and procedural circumstances of this case are highly idiosyncratic and unlikely ever to recur. Nothing about this case makes it appropriate for review.

I. The Decision Below Creates No Conflict Among the Circuits.

Petitioner's attempt to manufacture a circuit split begins with a mischaracterization of the decision below. According to petitioner, the D.C. Circuit "ruled, as a matter of law, that district courts do not have discretion to apportion fee responsibility when apportionment would result in less than a fully compensatory fee award for a prevailing plaintiff." Pet. 8. But the ruling was far more qualified than that.

An accurate statement of the court of appeals' ruling is that district courts do not have discretion to apportion fees when (a) the plaintiff "ha[s] achieved excellent results in civil rights litigation" and therefore "should normally receive a fully compensatory attorney's fee," Pet. App. 7a; (b) the plaintiff's claims against multiple defendants were not "fractionable," having "centered on a set of common issues against two or more jointly responsible defendants," Pet. App. 12a (internal quotation marks omitted); and (c) apportioning part of the fee award to a party "who cannot be made to pay" would be inconsistent "with the court's duty to ensure that a successful § 1983 plaintiff is awarded a fully compensatory fee." Pet. App. 13a.

No decision cited by petitioner, and no decision of which we are aware, conflicts with the decision below. Petitioner points to ten federal cases that, it says, conflict with the D.C. Circuit's ruling. We show below that none of them does.

Petitioner's lead case is *Southeast Legal Defense Group v. Adams*, 657 F.2d 1118 (9th Cir. 1981). As the court below recognized, Pet. App. 14a, that case is not remotely similar, for it involved *separate claims* successfully brought against the federal and state defendants. The successful claim against the federal defendants was that they had improperly approved

the state's selection of a particular corridor for a proposed highway. 657 F.2d at 1120. The successful claim against the state defendants was that they had improperly selected that corridor without "afford[ing] full opportunity for effective public participation . . . before submission to the Federal Highway Administration for approval." *Id.* at 1122 (internal quotation marks omitted). Thus, the time spent litigating the two claims was properly segregated for purposes of awarding fees. In affirming the district court's 75%-25% apportionment, the court of appeals went out of its way to explain that "[t]his is *not* a case of reducing fees by 25%, but rather is a case where plaintiffs are only entitled to fees for their action as against the state defendants. Since plaintiffs are not entitled to fees for their suit against the federal defendants, they cannot recover them from the state defendants." *Id.* at 1125 (emphasis added).[23]

Plaintiffs did not dispute below, and do not dispute here, that in cases involving separate claims against separate defendants, fees may be apportioned so that each defendant bears the cost of its own wrongdoing. *See, e.g., Dean v. Gladney,* 621 F.2d 1331, 1339-40 (5th Cir. 1980), *cert. denied,* 450 U.S. 983 (1981) (apportioning fees where discrete injuries were caused by different defendants). *Adams*

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[23] The Board asserts here, as it did below, that *Adams* did not involve separate claims because the plaintiffs in that case "'prevailed on' only 'their eighth claim'" against both the state and federal defendants. Pet. 11 n.2. The court of appeals rejected the Board's analysis of *Adams*, for the good reason that the "eighth claim" included *both* an allegation that the state defendants improperly held a public hearing on the route of the proposed highway after already having made up their minds about the route, *and* the *separate* allegation that the federal defendants improperly approved the route that had been selected after that sham process. *See* 657 F.2d at 1120-21. Moreover, in apportioning fees, the *Adams* court did not consider only the work done on the successful "eighth claim," but the total time plaintiffs' counsel spent litigating their separate claims against each defendant. *See id.* at 1125-26.

is simply an example of that situation, and, as such, it has no relevance here, where both defendants responded to the *same* claims.[24]

Petitioner next cites *Jones v. Espy*, 10 F.3d 690 (9th Cir. 1993). That case also involved fee claims against a state defendant under § 1988 and against the United States under EAJA, but as plaintiffs had achieved only a "partial victory," *id.* at 691, fully compensatory fees were not in the offing. The district court apportioned the partial fees that it did award on a 50-50 basis, and because the federal defendant's EAJA liability was capped at an hourly rate below market rates, plaintiffs did not collect as large an award as they would have if the fees had been unapportioned. However, the 9th Circuit carefully explained that, as in *Adams* (which it followed, *see* 10 F.3d at 692), "this is not a case in which the plaintiffs' 'full' award has been reduced; rather, it is one in which one defendant is fully liable for the attorney fees expended *against it* and the other is not." *Id.* (emphasis added). Specifically addressing the argument that *Jones* involved common claims against the state and federal defendants—an argument relied upon by petitioner here, Pet. 11 n.2—the *Jones* court responded:

> The plaintiffs also argue that the [district] court's factual characterization was incorrect in that the same amount of time would have been expended even if only one defendant were involved. Clearly, this is a question of fact that was resolved adversely to the plaintiffs, and we are presented with no information demonstrating this finding was clearly erroneous.

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[24] As noted earlier, plaintiffs sued only the Board of Elections. The United States subsequently intervened to defend against the same claims. No separate or additional claim was ever asserted against the United States.

10 F.3d at 692 n.3. Thus, petitioner's effort to show a conflict again runs aground on a dispositive factual finding that is directly at odds with petitioner's theory and with the undisputed facts of this case.

In *Sable Communications, Inc. v. Pacific Telephone & Telegraph Co.*, 890 F.2d 184 (9th Cir. 1989), the court reversed a holding that General Telephone, a late intervenor, should be jointly liable for *all* of plaintiff's fees, including the large portion that had been incurred before General Telephone even entered the case. *Id.* at 194. The court explained that under those circumstances, a "[f]ailure to apportion fees fairly between the defendant and the intervenor would discourage intervention in civil rights cases, a result to be avoided." *Id. Sable* also noted that "'a fair result for [all] parties'" required that the defendant whose *conduct* was the focus of the litigation bear the major responsibility for the fees. *Id.* (quoting *Adams,* 657 F.2d at 1125). Thus, *Sable* is not at all consistent with the district court's allocation decision in this case, because here the district court allocated the bulk of the fees not against the original defendant, whose *conduct* (refusal to count the ballots) required the litigation, but against the intervenor United States—including fees incurred before the United States even entered the litigation, which was precisely the result that the *Sable* court found *improper.* Additionally, the apportionment in *Sable* did not have the effect of depriving the successful plaintiff of his fully compensatory fee.[25]

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[25] Petitioner cites a fourth Ninth Circuit case, *Corder v. Gates*, 947 F.2d 374 (9th Cir. 1991), for the proposition that "a district court should be given the discretion to prescribe apportionment 'when the time expended by the plaintiff in pursuing each defendant was grossly unequal.'" Pet. 15 (quoting *Corder* at 383). Neither we nor the D.C. Circuit have any quarrel with that proposition, unless such an apportionment is used to deprive a fully successful plaintiff of a fully compensatory fee for his attorney's work on common claims. The

Petitioner also relies on *Herbst v. Ryan*, 90 F.3d 1300 (7th Cir. 1996), which involved a successful challenge to an Illinois abortion statute. The defendants were two state officials and the state's 102 State's Attorneys. None of the State's Attorneys had ever enforced the challenged statute, *id.* at 1303, but had they done so they "would have been acting as *state* agents." *Id.* at 1302 (emphasis added). Yet had they been required to pay plaintiffs' attorneys' fees, those payments would have come out of their respective *county* treasuries. *Id.* at 1303 n.6. Under the circumstances, the Seventh Circuit affirmed the district court's decision to apportion 100% of the fee liability to the state, given that the entire litigation "was a defense of a state policy by state officers on behalf of the state." *Id.* at 1306.

Nothing in the decision below would preclude that same sensible result under the same circumstances, for the plaintiffs in *Herbst* received a fully compensatory fee. *See id.* at 1306 n.13. The D.C. Circuit did not say that considerations of comparative fault, responsibility or fairness could *never* be considered in allocating fees; it said only that "Section 1988 does not permit a court to inquire into defendants' comparative fault *where to do so obstructs Congress' purpose of compensating successful private attorneys general.*" Pet. App. 13a (emphasis added) (citing *Coalition for Basic Human Needs v. King*, 691 F.2d 597, 602 (1st Cir. 1982) (Breyer, J.)). The Seventh Circuit in *Herbst* made clear that it agrees with the D.C. Circuit in that regard, explaining that "[i]t is frequently appropriate to hold all defendants jointly and severally liable for attorneys' fees," 90 F.3d at 1305, and that in considering any allocation of fees, a district court "ought to consider the broad remedial purposes of the

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holding in *Corder* is entirely consistent with the D.C. Circuit's decision here, for *Carder* affirmed the district court's decision to hold multiple defendants *jointly and severally liable* for the plaintiffs' fees. 947 F.2d at 383.

Civil Rights Act and the role that section 1988 plays in effectuating these goals." *Id.* at 1304. In particular, the *Herbst* court emphasized, courts should bear in mind that "the *overriding* goal of section 1988 is to reimburse, with a reasonable attorneys' fee, those private attorneys general who invoke and thereby invigorate federal constitutional and statutory rights." *Id.* (internal quotation marks and citations omitted) (emphasis added).

Indeed, the court in *Herbst* strongly hinted that it would follow the same course as the D.C. Circuit in circumstances like those presented here. Responding to a suggestion that the plaintiffs might face difficulties in collecting their fees from the state, the court noted with approval "that a number of courts have upheld the imposition of joint and several liability for a fee award where there existed a question as to whether the fee would be collectible from one of the defendants." *Id.* at 1306 n13.

Petitioner's next case is *Koster v. Perales*, 903 F.2d 131 (2d Cir. 1990). The facts and holdings of *Koster* do not help petitioner. The Second Circuit there affirmed an award of fees *jointly and severally* against multiple defendants, holding that enforcement agencies are liable for fees even when they are enforcing policies that are not of their own making, *id.* at 137, and that "joint and several liability is appropriate where the action or inaction of several defendants produces a single indivisible injury." *Id.* at 140. Those holdings are fully congruent with the ruling of the D.C. Circuit here, where the enactment and enforcement of the Barr Amendment produced a single indivisible injury to the plaintiffs.[26]

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[26] From the same Circuit, petitioner also cites *Firebird Society v. Members of Board of Fire Commissioners*, 556 F.2d 642 (2d Cir. 1977), where defendants were held not liable for a small portion of the

Council for Periodical Distributors Ass'ns v. Evans, 827 F.2d 1483 (11th Cir. 1987) is to the same effect. Petitioner correctly identifies the relevant passage from *Evans:*

> In cases where two or more defendants actively participated in a constitutional violation, it will frequently be appropriate to hold all defendants jointly and severally liable for the attorney's fees. In [other] cases . . . however, it may be appropriate for a district court to apportion fees between the active instigator of a wrong and a more passive co-defendant who had a more peripheral or ministerial role in the wrong.

Id. at 1487 (quoted at Pet. 14-15). This analysis can give petitioner no comfort here, for the D.C. Board of Elections was the defendant that directly and actively violated plaintiffs' rights, by refusing to count plaintiffs' ballots. Its role cannot fairly be described as "passive."

Finally, petitioner string-cites *Little Rock School Dist. v. Pulaski County Special School Dist.*, 787 F.2d 372 (8th Cir. 1986) and *Knights of Ku Klux Klan v. East Baton Rouge Parish School Bd.*, 735 F.2d 895 (5th Cir. 1984). Pet. 15. If the two-paragraph *per curiam* order in *Little Rock* stands for anything, it is only that fees can sometimes properly be

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prevailing plaintiffs' fee that was incurred in opposing intervention by a third party who wished to set aside a consent decree, an intervention that the defendants also opposed. This case would be analogous to *Firebird* if the D.C. Board of Elections had agreed to count and certify the election results and the United States had then sought to intervene to enjoin that settlement. Of course those facts did not occur. To the contrary, the Board of Elections' action in refusing to count the ballots meant that the Board was aligned, *in fact,* with the United States. As the court of appeals observed, "Turner incurred and continued to incur attorney's fees and expenses because the Board refused to certify the election results." Pet. App. 10a.

allocated among defendants. *Baton Rouge* upholds an allocation of 90% of fees against the United States in a case where the federal government was the primary instigator of a conspiracy to violate the plaintiff's constitutional rights. But the court makes clear that fees could have been assessed jointly and severally: "Where, as here, the issues before the court involved a 'common core of facts' and 'related legal theories,' it may be 'difficult to divide hours spent on a claim by claim basis." 735 F.2d at 901 (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 435 (1983)). Neither case is at odds with the decision below.

In sum, petitioner's cases stand for the unsurprising proposition that an apportionment of fees is sometimes required, is sometimes permissible, and is sometimes improper, and that district courts have discretion in allocating fees but may not abuse that discretion. Nothing in the decision below suggests that the law is otherwise in the District of Columbia Circuit. None of petitioner's cases holds that apportionment is required where it would deprive a fully successful plaintiff of a fully compensatory fee. None holds that a defendant who enforces a challenged law is not liable for a fully compensatory fee. Nothing in petitioner's cases suggests that any other Circuit would have exempted the D.C. Board of Elections from joint and several liability for plaintiffs' reasonable attorneys' fees under the facts of this case.

II. The Decision Below is Correct.

1. As the court of appeals recognized, there is nothing novel about this case except the novel theory fashioned by the magistrate judge to avoid imposing liability upon the District of Columbia. While plaintiffs share the D.C. government's frustration at congressional interference in

local matters (as exemplified by the Barr Amendment), the court of appeals factually pointed out that

> [t]he unique relationship between Congress and the District of Columbia under the Constitution simply means that there will be occasions when the District of Columbia government must pay attorney's fees for successful § 1983 lawsuits challenging laws that the District Government did not enact, for any Act of Congress that is solely applicable to the District of Columbia is a law of the District of Columbia for § 1983 purposes.

Pet. App. 13a. In other words, when enacting laws applicable only to the District of Columbia, "Congress acts as the local legislature for the District of Columbia." *District Properties Associates v. District of Columbia,* 743 F.2d 21, 27 (D.C. Cir. 1984). Once that basic fact is accepted, the District's liability for fully compensatory attorneys' fees in this case follows, independent of any liability *vel non* of the United States, for the District is fully responsible for the Barr Amendment as a matter of law.[27]

2. Even putting aside the District's direct responsibility for fees as the government entity whose law was successfully challenged, the District is liable because its Board of Elections actively enforced the Barr Amendment against the

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[27] Congress was entirely aware of what it was doing when it amended § 1983 to add the phrase "any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." Pub. L. No. 96-170, § 1, 93 Stat. 1284 (1979). As the House Committee on the District of Columbia explained, "[t]his change makes it clear that only the District of Columbia, and not the U.S. Government, is liable for Section 1983 violations committed by District officials acting under authority of those U.S. statutes." H.R. Rep. No. 96-548 (1979) *reprinted in* 1979 U.S.C.C.A.N. 2609, 2611.

plaintiffs. As this Court has recognized, "[f]ee awards against enforcement officials are run-of-the-mill occurrences." *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 739 (1980). That is true even when the enforcement officials dislike the law they are enforcing. Thus, in *Consumers Union,* fees were awarded against the Virginia State Bar as the entity that was charged with enforcing the challenged rule prohibiting attorney advertising, even though the State Bar had not enacted that rule and, indeed, had "endeavor[ed] to have the [rule] amended to conform to constitutional standards." *Consumers Union of the United States, Inc. v. American Bar Ass'n,* 505 F. Supp. 822, 823 (1981) (refusing to award fees), *rev'd by Consumers Union of the United States, Inc. v. Virginia State Bar,* 688 F.2d 218, 222 (4th Cir. 1982), *cert. denied,* 462 U.S. 1137 (1983). *Accord Kentucky v. Graham,* 473 U.S. 159, 165 (1985) ("liability on the merits and responsibility for fees go hand in hand").

Another leading case is *Venuti v. Riordan,* 702 F.2d 6 (1st Cir. 1983), written by then-Circuit Judge Breyer. There, plaintiffs sued the police chief and the Licensing Commission of Worcester, Massachusetts, asserting that a Massachusetts state statute restricting entertainment at restaurants and bars was facially unconstitutional. The Commonwealth of Massachusetts was not a party to the lawsuit; the defendants had no power to change the statute but were authorized to enforce it. Plaintiffs prevailed and were awarded fees. The defendants appealed, arguing—like the petitioner here—that the unconstitutionality of the state statute wasn't their fault and that enforcing it was their legal obligation. The court rejected their plea, noting that fees "are often assessed against defendants who enforce the laws instead of those who enact them." *Id.* at 8. The court affirmed the local defendants' sole liability for plaintiffs' full fees.

Many courts have awarded fully compensatory fees against defendants who simply enforced laws they had not enacted and perhaps disliked. *See, e.g., Martin v. Heckler,* 773 F.2d 1145, 1150 (11th Cir. 1985) ("It is also not a special circumstance sufficient to preclude a fee award against the state defendant that the state merely acted pursuant to federal regulation"), *overruled on other grounds by Texas State Teachers Ass'n v. Garland Independent School Dist.,* 489 U.S. 782 (1989); *Coalition for Basic Human Needs v. King,* 691 F.2d 597, 602 (1st Cir. 1982) (fees awarded against local government defendants who merely carried out state law); *Crosby v. Bowling,* 683 F.2d 1068, 1073 (7th Cir. 1982) ("fees can properly be taxed against those whose role is limited to enforcement of regulations that they had no role in promulgating"); *Holley v. Lavine,* 605 F.2d 638, 643-45 (2d Cir. 1979), *cert. denied,* 446 U.S. 913 (1980) (fees awarded against county for administering unconstitutional state law); *Johnson v. Mississippi,* 606 F.2d 635, 637 (5th Cir. 1979) (fees awarded against State Board of Education although it was "merely performing [its] duty by enforcing the [state] statute"). Indeed, a contrary rule would make 42 U.S.C. § 1988 meaningless in virtually all cases challenging the constitutionality of statutes and ordinances, for the legislature is not generally a proper defendant.

There is, furthermore, no unfairness in holding the Board liable for plaintiffs' fees here. After all, plaintiffs were forced to litigate this case to final judgment not because the United States filed a *brief* defending the Barr Amendment, but because the Board of Elections continued to *enforce* the Barr Amendment against plaintiffs.

3. It may be true that the Board of Elections felt that it had little choice but to enforce the Barr Amendment until the district court had rendered judgment. But the Eighth Circuit has explained why that is no defense:

> The short answer is that governmental officials are not bound to follow [statutory] law when that law is itself unconstitutional. Quite the contrary: in such a case, they are bound *not* to follow [statutory] law. It is true that a prosecuting attorney may not know for certain whether a state law is valid or not, and that he may feel obliged to enforce the law until a determination as to its validity has been made. . . . The point of § 1988 is that such officials proceed at their peril. If in fact they are wrong, and the law they are enforcing turns out to be invalid, § 1988 puts the financial burden on the state officials. The judgment of Congress is that the burden rests more properly on them than on the party who has been wronged by the application of an invalid law.

Carhart v. Stenberg, 192 F.3d 1142, 1152 (8th Cir. 1999), *aff'd,* 530 U.S. 914 (2000) (emphasis in original). This "short answer" applies with equal force to the situation that confronted the D.C. Board of Elections upon the enactment of the Barr Amendment.

4. Plaintiffs' failure timely to apply for fees against the United States did not relieve the Board of its liability for fees, because the Board's liability for fees under 42 U.S.C. § 1988 is not derivative of the United States' liability for fees under the entirely different standard of the Equal Access to Justice Act.[28] Indeed, plaintiffs were under no obligation even to

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[28] The United States strenuously denied liability under EAJA, *see* United States' Memorandum of Law in Opposition to Plaintiffs' Motion for Attorneys' Fees and Expenses, R.Doc. 51, and it is certainly possible that, even if plaintiffs had filed their EAJA application on time, the "substantially justified" standard of EAJA would have sheltered the United States from liability. Nor was that the United States' only ground for denying liability for fees. *See id.*

seek fees from the United States under that less favorable statute when they were entitled to a fully compensatory award of fees against the District under § 1988.

5. Finally, the D.C. Circuit was correct in recognizing that the strong congressional policy underlying the Civil Rights Attorneys Fees Act focuses on fairness toward successful civil rights plaintiffs, not fairness toward unsuccessful government defendants. As then-Judge Breyer explained in *Coalition for Basic Human Needs v. King*, 691 F.2d 597 (1st Cir. 1982):

> We turn finally to appellees' claim that this court should in its "discretion" withhold attorney's fees, presumably because special circumstances render the award "unjust." They base their claim on the fact that state law required them—under threat of criminal penalties—to deny the Coalition the [relief it sought] . . . .
>
> If the appellees mean this fact to show that they acted in good faith—that they felt obliged to withhold the funds and obliged to contest the Coalition's suit—we agree that they may have had good-faith reasons for their acts, but that is no reason to deny the Coalition attorney's fees. The Civil Rights Attorney's Fees Awards Act is not meant as a "punishment" for "bad" defendants who resist plaintiffs' claims in bad faith. Rather, it is meant to compensate civil rights attorneys who bring civil rights cases and win them.

Id. at 602 (citations omitted).

Petitioner's real complaint is not with the D.C. Circuit's unexceptional ruling that the technique of apportionment of

damages cannot properly be used to deprive a successful civil rights plaintiff of his statutory entitlement to a reasonable attorneys' fee. Petitioner's real complaint is with 42 U.S.C. § 1983, which makes the District of Columbia legally responsible for laws enacted by Congress without the District's consent, with the congressional determination to provide attorneys' fees to successful civil rights plaintiffs regardless of the "fault" of the losing defendant, and with the well-established doctrine that a government defendant who enforces a challenged law is liable for fees to a successful § 1983 plaintiff even if the enforcer disliked the law. But the validity of those statutes and doctrines is not before the Court, for the petitioner has never sought to challenge them.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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